No. 18636

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MELVIN LUCAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

NORMAN T. OLLESTAD,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

The appellant was indicted on October 31, 1962, and convicted on December 11, 1962, under the provisions of Section 751 of Title 18, United States Code. Judgment was entered on January 14, 1963 [C. T. 11].

The jurisdiction of the District Court rested on Section 3231 of Title 18, United States Code.

A timely notice of appeal was filed on January 15, 1963. [C. T. 14.][1]

This court has jurisdiction under Sections 1291 and 1294 of Title 28, United States Code.

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[1]C. T. refers to Clerk's Transcript of Record.

II.
STATEMENT OF THE CASE.

A Three-Count Indictment charging a violation of Section 751, Title 18, United States Code, was returned by the Grand Jury on October 31, 1962. Appellant was named in Count Three of the Indictment which charged substantially as follows:

That on or about October 12, 1962, in San Luis Obispo County, California, within the Central Division of the Southern District of California, defendant James Melvin Lucas, who was then in the custody of and confined by direction of the Attorney General at the Federal Correctional Institution, Lompoc, California, following his conviction in United States District Court, District of Arizona, of a violation of 18 United States Code, Section 2312, escaped from such custody and confinement. [C. T. 2.]

Counts One and Two charge William Purvis Beaugez, Jr., and LeRoy Taylor, respectively, with escape from the same institution on the same date. [C. T. 2, 3.] Both Beaugez and Taylor plead guilty as charged.

On December 11, 1962, at 10:00 A.M., in the chambers of the Honorable Leon R. Yankwich, Mrs. Lundberg, attorney for appellant Lucas, requested to read a statement to Judge Yankwich because "as a result of this he may waive a jury trial entirely and leave it up to your Honor." [R. T. 4, 5.] The Court gave its assent and Mrs. Lundberg read the following statement at that time.

> "By reason of illegality being held, violation of my constitutional rights, failure of the judge in

previous case to provide me with adequate counsel. The only reason that I left Lompoc was as follows:

"On October 31, 1960 in Tucson, Arizona, when I appeared before Judge Walsh he asked me how do you plead. I told him that I was not guilty, but that I was going to plead guilty, only because I could not stand the bedbugs and vermin in the County Jail. The attorney of record, who was appointed by the Court, did not appear at the time of plea or sentencing. After I was sentenced he visited me and told me that he was now ready to start fighting the case. I honestly believed him, and I know nothing about the law. But if the judge had protected my legal rights at that time, I would not have been sentenced to Lompoc. Also when I stated this in Court, the judge had the clerk read it back to him. The basis of my conviction was a car that was loaned to me by a friend. He did not, or would not prosecute, or appear against me as a complaining witness.

"This will all be substantiated by the transcript of that case. And if this judge is just, fair, and honest, he will have those records sent for. And he will also find that escape is impossible from an institution when you are being illegally held.

"There was no intent to escape, as I honestly felt that I was being illegally held. And not knowing law, this was the only method that I could employ, to get back into a Federal Court. Had I known the law, at the time of my sentencing, I would have appealed this case. But I was under the impression that even the judge would protect my rights. The

previous trial was nothing but a sham and frivolous immitation of a kangaroo court, and I honestly feel that this judge can correct a miscarriage of justice.

"I will waive jury trial with the stipulation that certain evidence be brought in that is pertinent to the case and basis of this charge." [R. T. 5, 7.]

Having read the above statement to the judge, the appellant Lucas waived jury trial [C. T. 5, R. T. 10], and was tried on December 11, 1962, before the Honorable Leon R. Yankwich [C. T. 5], and was found guilty on the same date.

On January 14, 1963, appellant was sentenced to the custody of the Attorney General for treatment and supervision pursuant to Section 5010(b), of Title 18, United States Code, until discharged by the Federal Youth Correctional Division of the Board of Parole as provided in Section 5017(c) of Title 18, United States Code, and it was further ordered that this sentence commence at the expiration of the sentence now being served. [C. T. 5, 10, 11.]

Appellant Lucas sent a letter on February 8, 1963, to the judge which was treated as a motion for modification of the sentence, and on February 12, 1963, this motion was denied. [C. T. 12, 13.]

A timely notice of appeal was filed on January 15, 1963. [C. T. 14.]

Appellant assigns the following errors:

1. The finding of guilty and judgment thereon was not supported by substantial evidence.

2. The appellant was denied due process of law within the meaning of the Fifth Amendment to the United States Constitution because:

(a) The finding of guilt was not supported by substantial evidence, and

(b) There was bias and prejudice on the part of the trial court in its attitude toward the appellant.

III.

STATUTES INVOLVED.

Section 751, of Title 18, United States Code, provides:

"Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both."

Section 144, of Title 28, United States Code, provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

IV.

STATEMENT OF THE FACTS.

The appellant was convicted of interstate transportation of a stolen motor vehicle, a violation of Title 18, U. S. C., Section 2312, in United States District Court, District of Arizona, in 1960, and sentenced to the custody of the Attorney General for an indeterminate sentence under the Youth Corrections Act. [R. T. 13, 47.]

Appellant was confined in the Federal Prison in Englewood, Colorado. [R. T. 47.] While at Englewood appellant attempted to escape and was then sent

to the Federal Correctional Institution at Lompoc, California, in June of 1961. [R. T. 37, 48.]

In July 1962, while still at Lompoc, appellant was assigned as a medium O.W.O. inmate which meant that he could work outside the fence under the supervision of an officer. [R. T. 16, 17.]

On October 12, 1962, appellant was assigned to outside labor detail picking walnuts under the supervision of Lompoc Correctional Officer Steney L. Johnson, under whom the appellant had been working since July 25, 1962. [R. T. 14, 87.]

At the lunch period on October 12, 1962, appellant, together with inmates Leroy Taylor and William Purvis Beaugez, Jr., discussed how the prison was running and decided to escape. [R. T. 27, 50, 51.]

During the lunch period there was nothing unusual about appellant's demeanor [R. T. 30], and after the decision to escape was made the appellant appeared quiet and serious. [R. T. 35.]

After the conclusion of the lunch hour the detail of nine inmates under the supervision of officer Johnson resumed their work in the walnut orchard. [R. T. 15, 18.] The prison guard stationed himself approximately 10 to 20 feet away from the detail of prisoners as they picked walnuts [R. T. 64], and if any prisoner missed a walnut the guard would instruct him to pick it up. [R. T. 73.] The guard who had supervised the appellant on this particular detail for approximately three months observed no erratic or unusual behavior on the part of the appellant; no incidents occurred; and there was no departure of standard operating procedure during the afternoon. [R. T. 17, 84, 85, 87, 89.]

At approximately 3:25 P.M., officer Johnson informed the appellant and the rest of the nine inmates that it was time to quit work. [R. T. 15, 89.] Officer Johnson then turned his back and led the detail toward the north side of the orchard. [R. T. 15.]

The appellant and inmates Taylor and Beaugez chose this moment to make their escape [R. T. 27, 38], and the three ran from the orchard, climbed a barbed wire fence, ran across a ploughed field to the Santa Ynez River bed which is located 200 yards from the orchard. [R. T. 17, 28, 42, 52.]

Approximately two to three minutes after officer Johnson had turned his back on the detail he noticed that appellant Lucas, Taylor and Beaugez were missing from the detail, and immediately returned to the area in which they were working and conducted an unsuccessful search for the missing inmates. [R. T. 15.]

Appellant Lucas and the two other inmates alternatively ran and walked approximately 40 miles up the Santa Ynez River bed to the Cachuma Dam where they stole a pick-up truck by "hot wiring it" [R. T. 17, 22, 28, 32, 43], and headed south. The next evening, October 13, the California Highway Patrol picked them up at a road block near Ventura, California [R. T. 22, 25], and jailed them in the Ventura County Jail [R. T. 20.]

On October 14, 1962, at 12:30 A.M., Cyril Myhand, a Lieutenant at the Federal Correctional Institution, Lompoc, California, picked up the appellant Lucas, to-

gether with the other two inmates at Ventura County Jail and transported them back to the institution at Lompoc. [R. T. 20.] During the trip back to Lompoc all three stated that they didn't plan the escape but did it on the spur of the moment. [R. T. 21.] Appellant Lucas, during this trip stated that the three of them had made two mistakes and that the last one was that "they got caught, they stopped at the road block". [R. T. 23.]

V.

QUESTIONS PRESENTED.

The first question presented is whether or not the finding of guilt was supported by substantial evidence.

The second question is whether or not the appellant was denied due process of law within the meaning of the Fifth Amendment to the Constitution, because bias and prejudice on the part of the trial court was shown in its attitude toward the appellant.

VI.

SUMMARY OF ARGUMENT.

A. There is Substantial Evidence to Support the Verdict of the Trier of Fact.

B. Appellant was not Denied Due Process of Law within the Meaning of the Fifth Amendment to the Constitution.

1. The appellant has waived any objection to the trial judge on the basis of any possible bias and prejudice.

2. There was no bias or prejudice on the part of the trial court in its attitude toward the appellant.

VII.

ARGUMENT.

A. Sufficiency of the Evidence.

In a prosecution for a violation of Title 18, United States Code, Section 751, Escape from the Custody of the Attorney General, there must be proof of three facts, as stated in *Hardwick v. United States* (9 Cir. 1961), 296 F. 2d 24,

> "(a) that there was a conviction (b) that there was an escape and (c) that such escape was from a confinement arising by virtue of the conviction."

The Government's evidence has been fully summarized in the Statement of Facts and will not be re-detailed here. Each of the elements of the offense was amply proven by the evidence. The appellant stipulated that he was convicted of interstate transportation of a stolen motor vehicle in Federal District Court in Arizona in 1960, and by virtue of this conviction was confined at the Federal Correctional Institution at Lompoc, California, on October 12, 1962. [R. T. 13.]

There is extensive evidence that the appellant escaped from Lompoc on October 12, 1962, along with two other inmates of the institution. [R. T. 15, 17, 22, 28, 32, 42, 43, 52.]

Viewing the evidence in the light most favorable to the Government, there was more than sufficient evidence to support the conviction.

> "in appraising the sufficiency of the evidence, it is not necessary that this court be convinced beyond a reasonable doubt of the guilt of the defendant. On the motion for judgment of acquit-

> tal, the question is whether the evidence viewed in the light most favorable to the prosecution, is such that a jury might find the defendant guilty beyond a reasonable doubt."
>
> *United States v. Sawyer* (4 Cir. 1961), 294 F. 2d 24, at p. 31.

If there is sufficient evidence for the trier of facts to pass upon, the finding should not be disturbed in the Court of Appeals.

> *Sandez v. United States* (9th Cir. 1956), 239 F. 2d at p. 243.

See also,

> *Glasser v. United States* (1941), 315 U. S. 60;
>
> *Young v. United States* (9 Cir. 1962), 298 F. 2d 108, at p. 111;
>
> *Robinson v. United States* (9 Cir. 1959), 262 F. 2d 645.

Appellant Lucas contends that there is a preponderance of evidence showing the lack of the requisite intent to escape and therefore the evidence is insufficient to convict him. A similar contention was made and rejected in *Rademacher v. United States* (5 Cir. 1960), 285 F. 2d 100. Here, as in *Rademacher,* there is more than ample evidence that the appellant had the requisite intent to escape. Appellant planned the escape with two other inmates [R. T. 27, 50, 51], and chose a moment when the guard's back was turned to effectuate it. [R. T. 27, 38.] The three escapees then traveled 40 miles up the Santa Ynez River at which time they stole and hot-wired a truck, and it was not until they were stopped by a California Highway Pa-

trol road block that they were returned to custody. [R. T. 17, 22, 25, 28, 32, 43.]

Appellant further contends that he was unable to form any intent due to the fact that he had been drinking "raisin jack" and chewing "jimson weed." A somewhat similar defense was alleged in *Mills v. United States* (5 Cir. 1951), 193 F. 2d 174. In *Mills* the court held that the evidence was insufficient to sustain the defense that the defendant did not intend to escape and that he had taken so many pills that he did not know what he was doing. We have the same situation in the instant case. The evidence shows that the appellant was under close supervision by the prison guard during the day that he escaped, was acting normally, and was able to effectuate a clever escape. [R. T. 17, 22, 23, 28, 30, 32, 35, 42, 43, 52, 73, 84, 85, 87, 89.]

B. The Appellant Was Not Denied Due Process of Law Within the Meaning of the Fifth Amendment to the Constitution.

1. The appellant has waived any objection to the trial judge on the basis of any possible bias and prejudice.

Appellant Lucas did not file a timely and sufficient affidavit of bias and prejudice of the trial court as required by Title 28, Section 144.

Appellant Lucas requested that the trial court listen to his statement which was read by his attorney prior to trial. After having this statement read to the judge, the appellant then waived trial by jury. [R. T. 4-9.] Appellant raises the question of bias for the first time in this court, and thereby waived any assertion of constitutional infirmity in his conviction.

As stated in *Pacheco v. People of Puerto Rico* (5 Cir. 1962), 300 F. 2d 759, at p. 760:

> "If a judge is subject to disqualification, the party concerned must complain promptly. He cannot be allowed to wait to see how the judge decides. In re United Shoe Machinery Corp., 276 F.2d 77, 79 (C.A.1, 1960)."

In *Yakus v. United States* (1944), 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834, the United States Supreme Court said:

> "No procedural principle was more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

2. The record indicates no bias or prejudice on the part of the trial court in its attitude toward appellant Lucas. The suggestion of appellant on page 34 of his brief that the "trial court was unable to erase the memory of appellant's statement from its mind," and thus "did not weigh the evidence presented in court," are not statements of fact supported by the record, but merely conclusions or conjectures on the part of the appellant. The record shows that the trial judge weighed the evidence impartially, and committed no error by sitting as the trier of fact in this case.

Willenbring v. United States (9 Cir. 1962), 306 F. 2d 944.

Conclusion.

There being no error, the judgment of the court below should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

NORMAN T. OLLESTAD,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

NORMAN OLLESTAD,
Assistant U. S. Attorney.